

(412)644-5754

DATE: APRIL 9, 1999

CASE NO: 1997-ERA-61

In the matter of

JOHN A. JUSTUS
Complainant

v.

TENNESSEE VALLEY AUTHORITY
Respondent

Appearances:

Christopher D. Poole, Esq.
For the Complainant

Brent R. Marquand, Esq.
John E. Slater, Esq.
For the Respondent

BEFORE: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, which prohibits the Nuclear Regulatory Commission Licensees from discharging or otherwise discriminating against an employee who has engaged in activity protected under the Act. John A. Justus (Complainant) filed a complaint under the Act on October 21, 1996, which was investigated by the Wage and Hour Division and found to be without merit. Complainant made a timely request for a hearing before an administrative law judge. Respondent filed a Motion for Summary Decision on June 15, 1998, alleging Complainant was unable to present a *prima facie* case. Complainant had recently retained an attorney and he filed his Answer to Respondent's Motion for Summary Decision on July 16, 1998, with sufficient information to determine that there was a genuine issue of material fact. An Order Denying Respondent's Motion for Summary Decision was issued July 23, 1998. Respondent filed a Motion for Partial Summary Decision on October 9, 1998, stating that nine of the eleven positions for which Complainant was alleging he had applied but had not been selected had been canceled

without being filled. Complainant did not file a response. An Order Granting Partial Summary Decision was issued on November 5, 1998. On November 12, 1998, Respondent filed a Motion in Limine, stating that an additional six jobs that Complainant was alleging he had applied for but had not been hired had been filled between March 7, 1994 and July 17, 1995. Respondent stated that only Vacancy Position Announcement (VPA) 10302 was filled within 180 days of the filing of Complainant's complaint. Complainant responded at the hearing by stating that the discrimination was ongoing. The Motion in Limine was granted. A hearing was held before the undersigned in Chattanooga, Tennessee on November 17, 1998. Complainant's exhibits (CX) 1-2 and Respondent's exhibits (RX) 1-10 were admitted into evidence. Both parties submitted closing briefs.

Issue

Was Complainant not selected for a vacancy within Respondent's organization for which he was otherwise qualified in retaliation for engaging in protected activity?

Summary of the Evidence

Complainant's Witnesses

Testimony of John Justus

Complainant testified that he had worked at Respondent for eighteen to twenty years, with most of his time at Watts Bar Nuclear Plant. (TR 14) He was a part of the crew preparing Watts Bar for startup. (TR 15) His last job before being transferred to Services was in Quality Assurance (QA). (TR 15) Complainant started out in the training center at Sequoyah Nuclear Plant for eighteen months. (TR 23) The training program continued at Watts Bar for six months. (TR 24) After training, Complainant became an assistant unit operator at Watts Bar. (TR 24) Then, he got his reactor operator's license (RO) at Sequoyah and worked at Sequoyah, starting up Unit One and doing pre-operations on Unit Two. (TR 24) Complainant came back to Watts Bar, where he eventually became a unit operator. (TR 24) Complainant went into training for a year at Watt's Bar to get his senior reactor operator's license (SRO). (TR 24) After that, he became a senior operating systems (SOS) instructor for approximately six years. (TR 25). In 1990, he went to work for QA because they wanted someone with knowledge of operations. (TR 25). He was later put into Services, where he was to look for other work although he still remained on in QA and working with the Joint Test Group. (TR 14, 34)

As a member of QA, Complainant's job was to review the procedures used to test the plant to make sure they were done properly and to insure the health and safety of the public. (TR 16) There was friction between QA and Watts Bar management as management's goal was to get the facility running and generating electricity on schedule. (TR 18) All of the departments had representatives that attended a Joint Test Group that discussed the various procedures and tests being run at the plant which would either approve the procedures or would send them back to a

group to be modified. (TR 19) This is where the friction was most apparent. (TR 19). Complainant testified that he had been yelled at several times in JTG meetings. (TR 16) He recalled a specific incident when he had requested that all of the test writers include a fuse list in their test to verify that the proper fuses were installed. (TR 16) This issue came up sometime in 1992-1993. (TR 95) Rick Purcell was chairman of the JTG most of the time, and when Complainant brought this up, Purcell screamed at him and Complainant characterized his reaction as violent. (TR 16-17). Purcell would yell and explode whenever problems were brought up in the JTG. (TR 90) Complainant testified that despite Purcell's yelling, the issue with the fuses was resolved to his satisfaction. (TR 93, 95)

Complainant made several statements to the Inspector General and the employee concerns committee in connection with James Kearney, a co-worker of Complainant's. (TR 20) Complainant did not seek them out, they came to him. (TR 84) His interviews with the Inspector General began in December of 1994 and went through May of 1995. (TR 99) Kearney had voiced concerns at JTG meetings and ended up being removed from his job and placed downtown. (TR 19) Although Complainant did not have actual knowledge of the meetings Kearney had attended, other than what Kearney had told him, and Complainant did not know who had removed Kearney from his job, Complainant did tell the Inspector General about an incident he had after Kearney had been transferred. (TR 20) Complainant was attempting to resolve some of his comments with the test writers, when Phil Collins told him that he had better sign off on his comments or he would end up downtown like Kearney. (TR 20) Although Complainant stated that Collins made that comment like it was a joke, Complainant took it as a threat. (TR 96, 20) Collins was a contractor with Respondent and had nothing to do with Vacancy Position Announcement (VPA) 10302. (TR 97)

Within six months after Complainant had spoken with the Inspector General, he felt he was getting "negative vibrations" from management. (TR 99) Around this time, Complainant recalled standing outside talking to Ralph Schmook, when Rick Mende, one of the plant managers, walked by quickly and said "Watch your back, Ralph." (TR 22, 98) Although Complainant has no direct evidence that Mende was referring to him and Complainant never worked directly with Mende, he felt that comment implied he was a back stabber. (TR 22, 99-100) At a JTG meeting later while discussing a gray issue, the chairman, who was Dennis Koehl at the time, said, "We'd better watch what we do because we don't know who we can trust in here", then he looked directly at Complainant. (TR 22, 123) Complainant has no other evidence Koehl was referring to him. (TR 122) Koehl had nothing to do with VPA 10302, either. (TR 123) However, it is Complainant's opinion that these incidents indicate that the managers talk to one another and that they got the idea he was a back stabber after his interviews. (TR 22)

Although Complainant acknowledged that Kearney was not the only person to bring up concerns to the JTG, nor was he the only person to be reassigned who had been on the JTG, he was the only person to get "shipped downtown." Complainant has never seen the inspector general's report in connection with Kearney's complainant other than his own signed statements. (TR 101) He does not know if any corrective action was taken as a result, but he did note that

the JTG and plant management began treating QA in a much more civilized manner. (TR 101) Complainant never discussed his involvement in the Kearney investigation with Purcell, Kulisek or Mende. (TR 124)

Complainant testified to another incident that hurt his popularity with the plant managers. (TR 27) Respondent had a commitment to the Nuclear Regulatory Council (NRC) that it would maintain updated revisions of the configuration control drawings or have older revisions of the drawings with redline modifications on hand to reflect what the current status of the plant was. (TR 25, 62) Respondent could not clear the equipment for testing or operation until the drawings were updated. (TR 62) Complainant wrote a monitoring report that the procedures used to ensure the protective boundaries remained on the equipment until the drawings were updated were inadequate. (TR 62) He gave the report to Rick Mende personally to take to the plant operation review committee. (TR 26, 28) Mende assured Complainant that no clearances would be issued until this problem was corrected. (TR 29) Complainant's report went to the meeting three times and was never acted upon because no one could decide who needed to correct the problem. (TR 29) Dave Kulisek, who was filling in for Mende as he was on vacation, was the last person to take the report to the plant operation review committee before the NRC caught Respondent without the updated drawings. (TR 29) Both Mende and Kulisek saw the report, knew Complainant wrote it and were most at fault for not seeing that the problem was corrected. (TR 29, 33)

After Respondent got in trouble with the NRC, Tom Arney, Complainant's supervisor, told Complainant that this was another example of how QA knew about a problem and did nothing about it. (TR 27, 34) Complainant felt that he was being blamed for the lack of action taken on his monitoring report. (TR 27) Complainant decided to close out his report, listing everything as it had happened in chronological order. (TR 27) Although Complainant did not name names in his report, it was clear who he was referring to by their position titles. (TR 29) Complainant closed out his report listing the corrective action of the Problem Evaluation Report (PER) from the NRC as taking care of any of the corrective actions that were needed. (TR 34) Complainant acknowledged that he did not ask his supervisor to issue a hold order on any work until the procedure for ensuring the equipment had up-to-date configuration control drawings could be corrected. (TR 119, 120)

Complainant testified that the only protected activity that he alleged in his original complaint to the Department of Labor was his involvement with the Kearney investigation. (TR 48, 63) He stated that, "At that time, I didn't want to air all of my dirty laundry." (TR 63) Complainant admitted to continually misidentifying the PER as WB 920058 in his interrogatories, response to Respondent's Motion for Summary Decision and his deposition testimony. (TR 53, 56-57, 68, 70) Complainant testified that the day of the hearing was the first day that he was able to identify RX 5 and RX 6 as being the incorrect PER and monitoring report that was the basis for his protected activity. (TR 70)

Complainant testified that he was his support of Kearney and his continually bringing up concerns to the JTG that caused friction with Rick Purcell. (TR 32) The biggest cause of friction between Complainant and Kulisek and Mende was the incident with the configuration control drawings. (TR 32)

Complainant applied for VPA 10302 for a senior shift operations supervisor (SOS) instructor while he was in Services. (TR 35) Respondent stipulated that Complainant met the minimum requirements for the job. (TR 38) Complainant felt that his previous six years as an SOS instructor at Watts Bar from 1984 to 1990, his number of years with Respondent, and his aerospace degree in aerospace administration went beyond the minimum qualifications for the position. (TR 39, 108) It was Complainant's opinion that his number of years of experience with Watts Bar was a significant asset for this job as there are many differences between plants and he was already familiar with Watts Bar. (TR 40) Complainant received his SRO license in 1984, but it was a cold license. (TR 108) A hot license is given after an individual is tested on the equipment operating at the plant at the time, a cold license is given after an individual has been tested on a simulator. (TR 108) Complainant acknowledged that it would be helpful to have had experience working in a hot plant for VPA 10302, especially if that experience were at Watts Bar while it was hot. (TR 109) Complainant stated that despite having been out of operations for six years when he applied for this job, he did not think he would need additional training unless he wanted another SRO license. (TR 110) Complainant believed that the additional license would require approximately three months of training. (TR 111) Complainant was of the opinion that an SRO license was not required for the position even though an SOS instructor is responsible for training people to get their SRO license. (TR 113) Complainant was not interviewed for the position. (TR 40) Complainant acknowledged that Sam McNair's experience as an instructor and in operator training was more current than his own. (TR 116)

Complainant stated that he did not know Sam McNair, who was the manager for VPA 10302 when he applied. (TR 113) When the plant became operational, out of seventy-nine people in QA, eighteen were kept. (TR 73) Complainant did not have any personal knowledge that Rick Purcell, Dave Kulisek or Rick Mende were involved in the selection process for VPA 10302. (TR 73, 74, 75) However, he thought that Purcell and Mende, who was "over operations" would have input by virtue of their positions. (TR 74) He thought that Kulisek would have input if he was still in operations at the time Complainant applied for the position, although Kulisek is now in technical support. (TR 75, 78) Complainant did not know when Kulisek moved to technical support. (TR 79) Technical support is a different organization than nuclear training. (TR 79)

Testimony of Bill Karsner

Karsner has been self-employed since October 1, 1996. (TR 135) Prior to that he was in Respondent's Services organization where he was sent after being the QA representative on the JTG, a job he had for three years. (TR 135-136) Karsner worked with Complainant and Kearney. (TR 135) He stated that his and Complainant's tasks were a little different than other QA personnel because they were not doing inspections, but reviewing the start-up procedures as both

had been operators and knew the plant. (TR 145) Most of the time, he and Complainant attended the JTG meetings as Kearney was representing the start-up group. (TR 144) Karsner had no personal knowledge of the events that caused Kearney to be sent downtown. (TR 137) Karsner testified that he felt comfortable stating his opinions on problems at the plant, but there was a general sentiment that everyone should do everything they could to resolve the problem before the JTG meeting, so there would not have to be a "no" vote on a procedure. (TR 138) If you felt strongly about a point, there was pressure from management to accept a compromise. (TR 138) Karsner did not see anything wrong with trying to get a problem resolved before a JTG meeting to avoid a "no" vote.

Karsner interacted with Purcell as he was the manager of JTG. (139) They had times when they did not see eye to eye, but these issues would get resolved. (TR 139) Karsner had to write Purcell up a few times for violating administrative procedures in his efforts to get the plant online. (TR 140) Purcell did not appreciate it and let him know. (TR 140) Karsner would not have thought twice about writing up Purcell if his own supervisor, Sam Crowe, had backed him up in his decision to write a report. (TR 141) Karsner did not think this was a common attitude of his management, but QA management was also feeling pressure to get the plant online. (TR 141-142) Karsner never saw Purcell explode or become violent during a disagreement. (TR 152)

Once the plant was almost online, it went through a reorganization. (TR 142) Everyone had to apply again to retain their jobs. Only a couple of supervisors and one other person was retained; everyone else went to Services on paper, but remained in QA and continued what they were doing. (TR 142) Karsner became concerned at the end of 1994 when everyone received performance evaluations and he felt that everyone that was not going to be retained got low marks so Respondent would not have to give out bonuses. (TR 142) After his first quarterly review in 1995, Karsner went into Services because his evaluation had remained unchanged and he did not feel that Respondent was even attempting to be honest. (TR 143) Karsner applied for jobs while he was in Services, but he never heard anything from them. (TR 144) He did not think that many people in the Services organization got other jobs. (TR 151)

Testimony of James Kearney

Kearney has worked at Sequoyah as an instructor in operator training for the past two years. (TR 153) Prior to that, he was in Services. (TR 153) Before being transferred to Services, he was in QA at Watts Bar as vice chairman and representative to the JTG. (153) Kearney worked with Complainant and Karsner. (TR 154) He was the primary representative to the JTG and they were alternates. (154) Their primary responsibility was to review procedures and speak for QA. (154) Kearney testified that there were times that he had problems with how a procedure was done and it caused problems with the JTG. (TR 154) Kearney was sent into Services the same time as Complainant and Karsner. (TR 159) He did not get his current position from Services, but from a settlement of his Department of Labor claim. (TR 159)

Kearney testified that in December of 1993, he had reviewed a procedure which did not meet several of the standards and regulations it was required to meet. (TR 155) He convinced the start-up and test person to rewrite the procedure right before the JTG meeting. Kearney wanted to table the procedure until other members of the JTG had a chance to review it, but the chairman called it for a vote and he was the only one who voted to table it. (TR 155) Kearney commented that the start-up and test representative on the JTG became very vocal and came close to becoming physical. (TR 155) Shortly after this meeting, Kearney was called into a meeting with Scalice, Malone and Gazanas. (TR 155) Scalice told Kearney that he did not think the JTG was working well as a team and he was going to fix it. (TR 156)

In January, Kearney was reassigned to a temporary job in downtown Chattanooga. (TR 156) He was told that he was to be cross-trained to broaden his horizons, but Baron, his manager on the temporary position, told Kearney he had no future plans for him because of a whistleblower complaint that he filed at the end of January. (TR 164) Kearney felt the reassignment was a punishment for not going along with the JTG, especially as he had very little to do in his new position. (TR 157) Kearney was sent back to Watts Bar QA in June because of several violations the NRC had been issuing between January and June. (TR 156) He was told by Duane Davis that Davis was going to be reviewing every procedure he reviewed because the start-up and test person, Bajestani, thought Kearney was too nit-picky. (TR 157) In August, Kearney was told never to vote no on a preoperational test instruction, he was to take an action item and fix it himself. (TR 158) Kearney passed this information on to Complainant and Karsner. (TR 158)

Kearney testified that he did not have a problem accepting action items and correcting minor problems himself, but he felt that some of the major problems were a stretch for his capabilities and the resources of himself, Complainant, and Karsner. (TR 165) He explained that first, they were supposed to get the start-up and test person to fix the items, but if they could not get resolved, they would have to take up the action item themselves and negotiate with start-up and test to fix it. (TR 166) Kearney testified that for the most part, he was able to negotiate the changes ahead of time, persuade someone else to fix them, or if it was something minor, fix it himself. (TR 168)

On his quarterly review before he was sent to Chattanooga, Kearney was rated exceptional in all areas. (TR 161) When he received his annual review after he returned to Watts Bar, he was evaluated as barely meeting expectations. (TR 161) In regards to the JTG, he was evaluated as not meeting management expectations. (TR 161) Kearney testified that the reason given in his annual review for his poor performance rating was that there had been a violation in one of the procedures he reviewed. (TR 162) This statement was later changed to say that the NRC had comments on one of the procedures he reviewed after he pointed out that none of the procedures he reviewed had ever led to an NRC violation. (TR 162) Kearney stated that the NRC always had comments. (TR 162)

Kearney has never seen the final report from the inspector general. (TR 168) He did not see the statements anyone else gave in connection with the investigation. (TR 168) Kearney stated that he did not have any knowledge of the substance of Complainant's statements to the inspector general. (TR 169) The substance of what Complainant said to the inspector general was not generally known around the plant. (TR 169)

Respondent's Witnesses

Testimony of Ralph Schmook

Schmook is now the shift manager in unit operations at Watts Bar. (TR 129) He has held this position for two years. (TR 130) He knows Complainant through training and licensing classes and they would chat when they ran into one another. (TR 130) Schmook testified that he did not recall Mende ever saying "Watch your back, Ralph" or anything like it. (TR 131) Although he does not remember every conversation he had with Complainant or Mende, a comment like that would have raised a red flag. (TR 132) He was not aware of any talk that Complainant had been blackballed for his involvement in the Kearney investigation or his participation in the JTG. (TR 131) He does not think that his job with Respondent would have been affected had he testified that he heard the comment. (TR 133)

Testimony of Randy Higgenbothum

Higgenbothum has been a human resources consultant at Watts Bar for eight years. (TR 171) His job is to help the organization achieve its manpower requirements, handle employee complaints, post jobs, help select people for positions and handle reductions-in-force. (TR 171) Higgenbothum testified that from 1994 to 1996, Watts Bar was in a transition from a constructional phase to an operational phase. (TR 172) The goal was to make the plant competitive. A total of 571 positions were targeted as surplus. (TR 194) Employees at risk for having their jobs eliminated were notified and given the options of retirement alternatives or Services. (TR 173) Services is a separate division from nuclear power. (TR 173) As so many jobs were eliminated, the competition for any new job postings was fierce. (TR 174)

The process for filling vacancies at Watts Bar began with identifying the need for a position, then posting a vacancy announcement, giving employees a certain amount of time to respond, then once Human Resources receives the applications, forwarding them to the supervisor who will be making the selection. (TR 180-181) The selecting manager then makes a recommendation to his supervisors. (TR 183) Once the recommendation is approved, the individual selected is offered the job. (TR 183) A selecting manager can request to see an employee's personnel history which contains performance evaluations and other official records. (TR 189) It is an internal process within the company. (TR 181) VPA 10302 was for a position in the nuclear training department at Watts Bar. (TR 180) The supervisor for VPA 10302 was Sam McNair. (TR 184) Higgenbothum has no authority over the selecting managers. (TR 191)

Higgenbotham had no knowledge of Complainant being blackballed by the management at Watts Bar for his involvement with Kearney or his actions on the JTG. (TR 185) If he had heard anything about Complainant being blackballed, he would have brought it to someone's attention because that sort of thing is not tolerated. (TR 191)

Testimony of David Kulisek

Kulisek is the operations manager at Watts Bar and he has held that position since February of 1998. (TR 196-197) From the fall of 1996 until February 1998, he was the system engineering manager. (TR 197) From September of 1995 to the fall of 1996, he was the technical support manager. (TR 197) He was the operations support manager from mid-1991 through September 1995. (TR 197) He has worked at Respondent since January of 1981. (TR 197)

Kulisek is has a senior reactor operator's license and he knew Complainant from training. (TR 200) He did not think that they ever worked in the same organization at the same time. (TR 200) Kulisek does not recall an incident where the NRC stopped work at Watts Bar because work was being performed in violation of Respondent's commitment to the NRC to have up to date configuration control drawings. (TR 202) He is not denying that it may have happened, but he thinks he would recall something like that as it would be embarrassing. (TR 202) Kulisek was the operations representative on the JTG at the time, Rick Mende was his supervisor. (TR 207, 208) He cannot recall any report putting a bad light on his organization and he thinks he would recall something like that. (TR 208)

Kulisek recalls issues were brought up by everyone on the JTG, not just Kearney and Justus. (TR 203) He does not remember anyone being more outspoken than anyone else. (TR 203) In fact, he was one of the more vocal members of the JTG. (TR 203) He cannot recall attending a meeting of the JTG where Complainant was outspoken and members took issue with him, although he did not attend all of the meetings of the JTG. (TR 203) He does not specifically recall attending any meetings where Complainant was present at the JTG, although he is sure he did. (TR 208) He does not have any knowledge of Complainant being blackballed for speaking to the Inspector General in regards to his investigation into Kearney's complaints or because he raised issues in the context of the JTG. (TR 204)

He did not recall feeling any pressure on himself as an individual or seeing pressure put on anyone else to get the plant online, although there was a general pressure to get things up and running. (TR 206) He did not know of anyone being told to keep quiet and push things through the JTG meetings. (TR 206) It surprised him to learn that Kearney had been sent to Chattoonga as punishment for speaking his mind in a meeting. (TR 207) Kulisek had been very vocal about raising issues. (TR 207)

Kulisek had no input into who was hired for VPA 10302. (TR 201) The dates for application were January 18, 1996 until February 2, 1996 and Kulisek was the technical support manager at that time. (TR 201) He did not discuss Complainant with O'Brien, who was the training manager. (TR 201) Technical support is a different organization than nuclear training. (TR 209) Rick Mende no longer works for Respondent. (TR 213) He went to work at Widow's Creek. (TR 213) Mende never mentioned to any problems with Complainant to him. (TR 214) Kulisek has never seen the Inspector General's report on the Kearney investigation. (TR 214) The only statement he ever saw from that was his own. (TR 215)

Kulisek has hired people at Respondent. (TR 210) The vacancy is announced, then the applications are given to the hiring manager. He would look at an applicant's resume and sometimes their personnel history, then he would determine who he wanted to interview. (TR 210) The interviews would be conducted by a selection board. (TR 211) It was not unusual to discuss an applicant with his or her former manager. (TR 211) He is not aware of anyone getting a job or not getting a job by a casual comment a person made to a member of the selection board. (TR 212)

Testimony of Bruce O'Brien

O'Brien is the maintenance manager at Sequoyah. (TR 216) He started at TVA as the maintenance planning manager in March of 1992. (TR 216) Sixteen months later, he became the electrical maintenance manager. (TR 216) He was the site training manager through 1996. (TR 217) In the fall of 1996, he became the methods manager, then in March 1997, he moved into his current position. (TR 217) He has never worked in QA, was never a member of the JTG and never worked with Complainant. (TR 218)

As acting site manager, he was ultimately responsible for filling VPA 10302. (TR 219) VPA 10302 was for a senior shift operating supervisor (SOS) instructor. (TR 220) O'Brien explained that there are six programs in operations training and an instructor would have to be able to work in any of those programs as well as be able to develop training material, and implement, teach, and examine the material based on the NRC required for an operator training program to license their operators. (TR 220) In January of 1996, they had an immediate need for an SOS instructor. (TR 221) The ideal candidate would have an SRO hot license for Watts Bar with very recent training experience. (TR 221) The training experience needed to be recent because the training organization had gone through several changes and the methods for training and examining the training had changed drastically. (TR 221) They needed someone who could step in and start training immediately. (TR 221) An individual without a license would take two years to get up to speed, by the time they had received their license, had knowledge of all of the technical details and qualified as an instructor. (TR 222) They used the standard hiring process to find an individual for the position. (TR 221) Sam McNair was originally the selecting manager, then that job fell to him. (TR 222)

Human resources provided a background summary of all the candidates, including qualifications and any preferences, such as a veteran. (TR 224) Then, the list was narrowed down to a handful of qualified individuals who came close to what they were looking for. (TR 224) Ralph Goode and Howard Ricks were selected to be interviewed. (TR 225) Both Goode and Hicks had SRO hot licenses at Sequoyah which is a sister plant to Watts Bar. (TR 225) Ricks was a little light in training experience but he was working in operations. (TR 228) Goode was supervising training in operations at Bellefonte. (TR 228) It was not clear from Complainant's application what he was licensed on. (TR 226) Complainant's operations experience was six years old and his training experience was somewhat older. (TR 228) The fact that Complainant only held a cold SRO license was a significant factor in his non-selection for an interview. (TR 229) No one, including Mende, Purcell, Kulisek and Scalice, suggested that Complainant should not be interviewed. (TR 232) The only reason Complainant was not selected was based on his and McNair's review of Complainant's qualifications. (TR 232)

Goode and Ricks were interviewed by the selection board, which was made up of Terry Stockdale the operations superintendent, Terry Newman a senior operations supervisor instructor, Howard Cutshaw, a human resources officer, Sam McNair, and O'Brien. (TR 238) Neither candidate was selected for the position. (TR 233) Either candidate would require a significant amount of time before they would be able to begin training. (TR 233) Sam McNair became a late applicant for the position. (TR 233) McNair was the manager for all of the operations training instructors. (TR 233) Although McNair was an excellent instructor, he was struggling with his supervisory responsibilities. (TR 233) Because he was struggling and because they needed someone with his skills as an instructor, O'Brien talked to him about taking the position. (TR 234) McNair agreed and O'Brien brought it to the selection board, who concurred in his recommendation. (TR 234) There is not a doubt in O'Brien's mind that McNair was the most qualified candidate for the job. He was licensed at the site, great with the technical details, very good with the simulator operations, and he had kept current by occasionally teaching while in his supervisory position. (TR 234) Scalice and Purcell did have final approval over the position. (TR 239)

Documentary Evidence

Complainant submitted a copy of the VPA 10302 posting and his application. He submitted an organizational flow chart for Watts Bar.

Respondent submitted: a copy of the complaint and the Wage and Hour investigator's report; its First Set of Interrogatories and Requests for Production of Documents as well as Complainant's responses; the monitoring report and PER for WB 920058; the VPA 10302 posting, applications received for the posting, and notes of members of the selection board of the two individuals interviewed; organizational charts for Tennessee Valley Authority and its nuclear organization; and a list of all Watts Bar employees who had been targeted as surplus from September 1994 to December 1996.

Findings of Fact and Conclusions of Law

42 U.S.C. § 5851 provides that:

- (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
- (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954;
 - (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
 - (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
 - (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
 - (E) testified or is about to testify in any proceeding or;
 - (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such proceeding or in any other action to carry out the purpose of the Atomic Energy Act of 1954, as amended.

To establish a prima facie case of discrimination under § 5851, the complainant must show: (1) his employer is subject to the Act; (2) the complainant engaged in protected activity; (3) the complainant was subject to an adverse employment action; (4) his employer was aware of the protected activity when it took the adverse action; and (5) an inference that the protected activity was the likely reason for the adverse employment action. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y, January 18, 1996). *See also Carroll v. U.S. Dept. of Labor*, 78 F.3d. 352 (8th Cir. 1996). If the complainant establishes a prima facie case, the burden of the production shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action. *Carroll*, 78 F.3d. at 356. Where the employer articulates a legitimate nondiscriminatory reason for the adverse action, the complainant has the ultimate burden of persuasion that the reasons articulated by his employer were pretextual, either by showing that the unlawful reason more likely motivated the employer or by showing that the proffered explanation

is unworthy of credence. *Nichols v. Bechtel Construction Co.*, 87-ERA-44 (Sec'y, October 26, 1992); *Carroll, supra*; *Kahn v. U.S. Secretary of Labor*, 64 F.3d. 271, 278 (7th Cir. 1995).

There is no dispute that Respondent is subject to the Act. Complainant argues that his statements to the inspector general in connection with an investigation into allegations by his co-worker, Kearney, is protected activity as well as his report that the procedures to ensure the configuration control drawings were up-to-date prior to clearing equipment for use were inadequate. Courts are to interpret the Act broadly in order to implement its "board, remedial purpose". *American Nuclear Resources v. United States Department of Labor*, 134 F.3d. 1292, 1295 (6th Cir. 1998). A complaint involving safety and quality control issues is protected activity under the ERA. *McCustion v. Tennessee Valley Auth.*, 89-ERA- 6 (Sec'y Nov. 13, 1991). Complainant was a member of Quality Assurance when his alleged protected activities took place. The Secretary of Labor has stated:

[I]t is not required that every element of a legal cause of action be set forth in an employees section 5851 complaint. Moreover, a mere allegation that complainant was assigned quality assurance functions is sufficient to state a cause of action since it has been recognized that all quality control personnel are engaged in activity protected by section 5851. *Bassett v. Niagara Mohawk Power Company*, 86-ERA-2 (Sec'y July, 9, 1986) (slip. op at 2).

The Secretary of Labor has also held that internal complaints are protected activities under the ERA. *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991).

Complainant's statements to the Inspector General and the Employee Concerns Committee in connection with a complaint brought by a co-worker who voiced concerns, but was told to push items through the Joint Test Group, is protected activity. Although Complainant did not have actual knowledge of the specifics of his co-worker's situation, Complainant states that he told the Inspector General and the Employee Concerns Committee about the pressure he was feeling as a Quality Assurance representative to get the plant online. Being pressured to approve tests and procedures is a safety and quality control issue. Thus, Complainant's statements are protected activity. Although Complainant was unable to identify the monitoring report he wrote or the PER that arose out of it, the monitoring report also qualifies as protected activity under the Act as it too implicates issues of safety and quality control. Therefore, I find that Complainant has established that he engaged in protected activity under the Act.

The adverse employment action that Complainant is claiming is Respondent's failure to hire him for VPA 10302, a position for which he was qualified. An employer's failure to select a complainant for employment does not necessarily constitute an adverse action, as an employer is free not to hire any individual absent a discriminatory reason proscribed by law. *Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993)(slip. op. at 6). In order to show that a failure to hire is an adverse employment action, a complainant must establish:

(i) that he applied and was qualified for a job for which the employer was seeking applicants; (ii) that, despite his qualifications, he was rejected and (iii) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Samodurov, supra*, slip. op. at 6 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973)).

Complainant has established that he applied for a job for which Respondent was seeking applicants and Respondent has stipulated that Complainant was minimally qualified for the position. The position did remain open after Complainant's rejection, but Complainant cannot show that Respondent continued to seek applications from persons of Complainant's qualifications. Out of the pool of applicants, two individuals were selected to be interviewed for the position. Both of these individuals had hot licenses and more recent training experience than Complainant and qualifications that were more in keeping with the description of the ideal candidate for the position provided by Bruce O'Brien. Despite their qualifications, neither of these individuals was selected for this position. Although the position had not been filled, there is no evidence that Respondent posted the position again. Instead, O'Brien approached Sam McNair who was the supervisor for that position and spoke with him about accepting the position. McNair had a hot license at Watts Bar and extensive and very recent training experience. McNair fit the description of the ideal candidate given by O'Brien. The record indicates that Respondent was looking for an individual who had more than Complainant's minimum qualifications for the position. Therefore, I find that Respondent's failure to hire Complainant for VPA 10302 was not an adverse employment action.

Assuming for the sake of argument that Respondent's failure to hire Complainant for VPA 10302 was an adverse employment action, Complainant has not established that anyone was aware of his protected activity when the adverse employment action took place. Complainant referred to two incidents as establishing that management was aware of his protected activity. The first was Rick Mende saying, "Watch your back, Ralph" to Ralph Schmook in passing, while Schmook was outside talking to Complainant. Complainant admitted, however, that he had no direct evidence that Mende was talking about him and that, it was just his opinion. In addition, Ralph Schmook testified that he could not recall the incident and he thought he would remember a comment like that. Complainant also testified that Dennis Koehl, who was chairman of the Joint Test Group at the time, stated, "We'd better watch what we do because we don't know who we can trust in here", then looked directly at Complainant. This is still not sufficient to establish that Respondent was aware of Complainant's protected activity.

Both Kearney and Kulisek, who also offered statements to the Inspector General, testified that the only statements they read were their own and that they were unaware of the outcome of the investigation. Complainant's own witness, Kearney, as well as Kulisek, testified that they had no knowledge of what Complainant said to the Inspector General or any talk that Complainant had been blackballed around the plant. Kulisek, who was involved with Complainant's monitoring report, could not recall work being stopped by the NRC over the configuration control drawings. Complainant was also unable to identify the correct PER for that action. O'Brien was the selecting official for VPA 10302 at the time Complainant applied. He testified that he was never a member of Quality Assurance or the Joint Test Group, that he had never worked with Complainant, and that he did not even recognize Complainant's name. Complainant has not shown that knowledge of his protected activity was widespread at Watts Bar or TVA, nor has he established that anyone at TVA was aware of his protected activity when he was not hired for VPA 10302.

Additionally, Complainant cannot raise an inference that his protected activity is the likely reason for the adverse employment action. As stated previously, O'Brien, the hiring official at the time Complainant applied for VPA 10302, did not know Complainant. At the time Complainant applied for this position, Rick Mende no longer was employed by Respondent and Dave Kulisek was employed in Technical Support and had no influence over who would be hired for this position. There is no evidence in the record that any of the members of the selection board, Howard Cutshaw, Terry Newman, Terry Stockdale, and Sam McNair, knew anything about Complainant or his engaging in protected activity. Further, the two individuals who were interviewed from Complainant's application pool had more qualifications and up-to-date experience than Complainant. Complainant acknowledged in his own testimony that the individual selected for the position had a hot license at Watts Bar which would have been useful for the position, as well as more recent training and instruction experience. Rick Purcell did have final approval over who was selected to fill the position, but there is no evidence that he took an active role in the selection process.

As Complainant has been unable to establish a prima facie case of discrimination under the employee protection provision of the Energy Reorganization Act, his complaint must be dismissed.

RECOMMENDED ORDER

For the foregoing reasons, John A. Justus's complaint under § 5851 of the Energy Reorganization Act is hereby DISMISSED WITH PREJUDICE.

DANIEL L. LELAND
Administrative Law Judge

DLL/lwa/lab

NOTICE OF REVIEW: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served upon all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).